

UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF INDIANA  
HAMMOND DIVISION

CAT SCALE COMPANY, )  
                        )  
                        Plaintiff )  
                        )  
                        v.                 ) Case No. 4:04 cv 53  
                        )  
TRUCK STOP SCALE COMPANY d/b/a )  
TRANSCONTINENTAL WEIGHING )  
SERVICES and JBS, INC. d/b/a )  
GRANDMA'S TRAVEL CENTER, )  
                        )  
                        Defendants )

OPINION AND ORDER

This matter is before the court on the Motion to Strike Defendants' Answers and Affirmative Defenses filed by the plaintiff, CAT Scale Company, on September 16, 2005. For the reasons set forth below, the motion is **GRANTED**.

Background

This is the third Opinion and Order addressing the persistent discovery deficiencies of the defendants. Following an explicit warning on August 8, 2005 that the defendants' failure to comply with the court's first Order would result in the defendants' pleadings being stricken and default judgment entered in favor of the plaintiff, this court struck the defendants' answer to the plaintiff's original complaint on August 23, 2005.

Five days prior to the August 23, 2005 Opinion and Order, the court granted the plaintiff leave to file an amended complaint and ordered the new complaint to be filed within 10 days. Thus, five days after the defendants' answer was stricken in the August 23, 2005 Opinion and Order, the plaintiff filed its

amended complaint. In addition to the previously asserted federal claims of service mark infringement and unfair competition, the amended complaint added common law claims for trademark infringement and unfair competition, as well as a claim for dilution under the Texas Anti-Dilution statute, Tex. Bus. & Com. Code §16.29.

After the defendants filed answers to the amended complaint, the plaintiff moved to strike the answers under Federal Rules of Civil Procedure 8(b) and 12(f). The plaintiff argues that allowing the defendants to answer the amended complaint vitiates the sanctions imposed by the August 23, 2005 Order, and that the defendants' answers violate the Rule 8 directive to assert defenses and denials in "short and plain terms." See Rule 8(b).

Discussion

An amended complaint supersedes the previously filed complaint in its entirety. See 6 Wright, Miller & Marcus, *Federal Practice and Procedure 2d* §1476, p. 556 (1990). See also **Fullerton v. Maynard**, No. 91-7002, 1991 WL 166400, at \*1-2 (10<sup>th</sup> Cir. Aug. 29, 1991); **United States v. Allred**, No. 90-35435, 1991 WL 73710, at \*2 (9<sup>th</sup> Cir. May 9, 1991); **Jackson National Life Insurance Company v. Greycliff Partners, Ltd.**, 2 F.Supp.2d 1164, 1169 (E.D. Wis. 1998). Thus, "[o]nce an amended pleading is interposed, the original pleading no longer performs any function in the case. . . ." 6 Wright, Miller & Marcus §1467, pp. 558-59. The practical consequence of filing an amended complaint is that motions and sanctions relating to the original pleadings are

rendered moot. See, e.g., *Macario v. Pratt & Whitney Canada, Inc.*, No. 90-3906, 1990 WL 200125, at \*6 (E.D. Pa. Dec. 7, 1990) (finding that the plaintiff's motion to strike the defendant's answer was moot and denying a motion for sanctions because the plaintiff filed an amended complaint).

Here, the plaintiff revived this case after Federal Rule of Civil Procedure 37 sanctions effectively directing judgment in the plaintiff's favor had been entered, by the filing of an amended complaint asserting new claims. It would be unjust to permit the plaintiff to assert new basis of liability, including a state statutory claim, but to deny the defendants the opportunity to respond. However, striking only those portions of the amended answer which pertained to claims asserted in the original complaint could result in inconsistent judgments under the circumstances of this case, where some of the federal and state claims are parallel and involve the same facts. Therefore, justice requires that the defendants be permitted to answer the amended complaint in its entirety.

The fact that this court "ordered" the plaintiff to file the amended complaint in ruling on the plaintiff's motion to file the same is of no consequence. The court's directive merely established a deadline, and the only penalty for the plaintiff's failure to comply with that Order would have been that the claims asserted in the original complaint would stand. The plaintiff had ample opportunity to withdraw its request to file an amended complaint, to notify the court that it did not intend to file new

pleadings in light of the August 23, 2005 Opinion and Order, or simply not to amend. Because the plaintiff chose to proceed with the amended complaint, the sanctions imposed on the defendants in the August 23, 2005 Opinion and Order are moot. However, the court cautions the defendants that the warning issued in the August 8, 2005 Opinion and Order remains in effect.

Nevertheless, the defendants' answers must be stricken with leave to refile because they violate Rule 8(b) which states that the answer must respond to the complaint in "short and plain terms." Compared to the 11 and 9 page answers filed by the defendants in response to the original complaint, Truck Stop Scale's amended answer is 22 pages long, and JBS, Inc.'s spans 33 pages. Both are replete with improper statements in contravention of Rule 8(b) and Rule 12(f), which permits the court to order stricken "redundant, immaterial, impertinent, or scandalous matter" from a pleading. See *Hardin v. American Electric Power*, 188 F.R.D. 509, 511-12 (S.D. Ind. 1999). As one example, both defendants argue in response to the amended complaint:

Defendant believes the allegations made are known to be false to Plaintiff. Defendant believes that Cat Scale intentionally deceived, lied, and misrepresented the facts surrounding its application for service and trade marks to the U.S. Patent and Trademark Office. Specifically, Plaintiff did not disclose the alleged infringement known to Plaintiff to the U.S. Patent and Trademark Office. Defendant did not and does not use the term certified scale in its scale signage. The term scale is generic. The color highway yellow is generic and is not the same as the color gold. There is no color "yellow or gold." A color is either one or the other

but not both. Defendant's application was for gold and it is not the same as highway yellow. Further, Plaintiff is seeking to continue the mystery around what is now a fairly widespread and practical technology as something magical or related to color, when in fact the technology is not proprietary to Cat Scale and available for purchase by anyone with sufficient funds. The confusion is not in the colors, but in the similar and competing services. What is connected is the same type scale [sic] technology and this is what bothers Cat Scale not the magic of making highway yellow into gold.

Plaintiff is not entitled to protection of its trademarks as they were fraudulently obtained. Cat Scale failed to disclose the alleged infringement to the U.S. Patent Office though it was well aware of the existence of Defendant's signage now argued to be infringing at the time of its application. It is the Defendant's common ownership of Toledo scale equipment and technology that is the source of the [sic] "damage" to Plaintiff not the alleged confusion over colors. The truckers recognized the efficacy of the technology, just as computer users recognized the efficacy of the Google technology. The success wasn't built on advertising budget, but investment in the technology that improved weighing services throughout the United States.

(Defendant's Amended Answers to Complaint d4)

It is difficult to imagine an averment less concise and more redundant, immaterial, and impertinent than this one. Because such statements abound throughout both defendants' amended answers, these answers are stricken fully. The defendants shall file revised answers within 10 days of this Order.

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For the foregoing reasons, the Motion to Strike Defendants' Answers and Affirmative Defenses filed by the plaintiff, CAT

Scale Company, on September 16, 2005 is **GRANTED**. The defendants are **ORDERED** to file revised amended answers by December 15, 2005. NO EXTENSIONS OF TIME WILL BE GRANTED.

ENTERED this 5<sup>th</sup> day of December, 2005

s/ ANDREW P. RODOVICH  
United States Magistrate Judge